

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

The first two issues raised by the respondent are jurisdictional and grant the Appeals Board jurisdiction to review a preliminary hearing order. See K.S.A. 44-534a, as amended.

(1) In the respondent's Application for Review, it raised the issue of whether claimant's right knee injury arose out of and in the course of his employment with respondent. However, the respondent did not address this issue in his brief before the Appeals Board. In fact, the only issue addressed and argued by the respondent in his brief was the timely notice issue.

The Appeals Board finds the preliminary hearing record contains the uncontradicted testimony of the claimant that his right knee injury occurred while he was working for the respondent. The medical records admitted into evidence also prove claimant has an injured right knee. Therefore, the Appeals Board affirms the Administrative Law Judge's decision on this issue.

(2) K.S.A. 44-520 requires the claimant to provide the respondent with notice of a work-related accident within 10 days of the accident or to show just cause within 75 days for not providing such notice.

Claimant testified he injured his right knee approximately two or three weeks after he had sustained an injury to his left knee at work on February 19, 1997. Claimant's left knee injury is not the subject of this proceeding and the respondent has voluntarily provided medical treatment for claimant's work-related left knee injury.

Claimant testified he did not notify the respondent about the right knee injury until approximately one month following the injury. However, claimant further testified that after he initially injured the right knee, the knee worsened as he continued to work.

The claimant performed his regular job as a residential trash person until he had surgery performed on his left knee by orthopedic surgeon James L. Gluck, M.D., on May 30, 1997. Dr. Gluck kept claimant off work until June 9, 1997, when he released claimant to return to light duty. The doctor then released claimant to return to regular work without restrictions on July 23, 1997. However, claimant returned to see Dr. Gluck with continuing left knee complaints and, for the first time, right knee pain and instability.

Claimant continued to perform his regular work until October 22, 1997, when Dr. Gluck again took him off work. At that time, Dr. Gluck had the claimant undergo an MRI examination which indicated that claimant's right knee had a complete tear of the ACL and also a medial meniscus tear. The doctor scheduled the claimant for right knee reconstruction surgery.

The Appeals Board finds the preliminary hearing record proves claimant initially injured his right knee at work sometime either in the latter part of February or in the first part of March 1997. The right knee injury worsened as claimant continued to work until October 22, 1997, when he was taken off work by Dr. Gluck and surgery was scheduled. Therefore, the Appeals Board concludes the appropriate date of accident for claimant's right knee injury is October 22, 1997, when he was taken off work by Dr. Gluck for surgery. See Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995). Claimant testified he notified the respondent of his right knee injury approximately one month following the initial injury. Claimant also filed the Application for Hearing for the right knee injury with the Division of Workers Compensation on September 5, 1997. Therefore, the Appeals Board concludes that claimant gave respondent timely notice of accident for his October 22, 1997, right knee injury as required by K.S.A. 44-520.

(3) Respondent also questions the Administrative Law Judge's authority to order respondent to provide medical treatment for claimant's right knee injury. The Appeals Board has found on numerous other occasions that the preliminary hearing statute K.S.A. 44-534a, as amended, authorizes the Administrative Law Judge, pending a full hearing on the claim, the discretion to make a preliminary hearing award for medical and temporary total disability compensation. Therefore, the Administrative Law Judge did not exceed his jurisdiction and the Appeals Board does not have jurisdiction to review this issue at this juncture of the proceeding.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge John D. Clark, dated December 9, 1997, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 1998.

BOARD MEMBER

c: Chris A. Clements, Wichita, KS
John David Jurcyk, Lenexa, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director